



REPUBLIC OF KENYA



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**Okoyo v Oketch & 4 others (Environment & Land Case 6 of 2022)
[2023] KEELC 16608 (KLR) (27 March 2023) (Judgment)**

Neutral citation: [2023] KEELC 16608 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KILGORIS
ENVIRONMENT & LAND CASE 6 OF 2022**

EM WASHE, J

MARCH 27, 2023

BETWEEN

NICHOLAUS OKOTH OKOYO PLAINTIFF

AND

PRISKA ONDIEK OKETCH 1ST DEFENDANT

ROSE ANYANGO OCHIENG 2ND DEFENDANT

BENSON OLILI OKETCH 3RD DEFENDANT

MICHAEL ODHIAMBO OKETCH 4TH DEFENDANT

JARED OOKO OKETCH 5TH DEFENDANT

JUDGMENT

1. The Plaintiff herein filed the Complaint dated 11/03/2017 against the Defendants herein seeking for the following Orders; -
 - i. Declaration that the Defendants herein do not have any lawful rights and/or interests over and in respect of LR No Transmara/Olontare/214, or any portions thereof, otherwise referred to as the suit property, whatsoever and howsoever.
 - ii. An Order of eviction against the Defendants herein, together with their agents, servants and/or any other person acting and/or claiming under the Defendants herein from LR No Transmara/Olontare/214 and/or any portions thereof.
 - iii. Permanent injunction restraining the Defendants either by themselves, agents, servants and/or anyone claiming under the Defendants from re-entering upon, trespassing onto, laying a claim to, cultivating, leasing, building on, interfering with and/or in any other manner, whatsoever



dealing with the suit property or any portion thereof, that is, LR No Transmara/Olontare/214, in any manner prejudicial and/or adverse to the rights and interests of the Plaintiff.

- iv. General damages for trespass.
 - v. Costs of this suit be borne by the Defendants.
 - vi. Such further and/or other relief as the Honourable Court may deem fit and expedient so to grant.
2. The Plaintiff was indeed served on the Defendants who first filed a Defence on the 04/04/2017 but amended the same through their Amended Defence and Counter-claim dated 22nd October 2018.
 3. The Defendants in their Counter-claim against the Plaintiff sought for the following Orders; -
 - a. An Order that the Applicants have been in adverse possession of approximately 3.2 Hectares being a portion of the property known as LR No Transmara/Olontare/214 for a period of over 12 years.
 - b. An Order that upon the expiry of the 12 years since the Applicant was in possession of LR No Transmara/Olontare/214, the late Gilbert T.O.Ochieng, the Late Masiliana Atieno Okoyo and the Respondent's (who are his heirs/beneficiaries) right over the said parcel of land got extinguished by the operation of law.
 - c. An order that the Respondents hold the title to the land and parcel LR No Transmara/Olontare/214 in trust for the Applicants in respect of the approximately 3.2 Hectares of the land.
 - d. An Order that the said parcel of land and parcel LR No Transmara/Olontare/214 measuring approximately 3.2 Hectares be transferred to the Applicants and the Applicants be registered as the owner thereof.
 - e. An order that the Respondent does execute the transfer documents in favour of the Applicant and in event of default, the Deputy Registrar of this Court herein be empowered to execute the same to give effect of the aforesaid orders.
 - f. An Order that the Respondent meet the costs of this suit.
 - g. Such other further reliefs this Honourable Court may grant in circumstances.
 4. The Plaintiff herein filed a Reply to the Defendants Amended Defence and Defence to the Counter-Claim dated 6th of February 2020 on the 13th February 2020.
 5. These closed the pleadings in this suit and the hearing commenced on the 18/01/2021.
 6. The 1st Plaintiff's witness was Nicholas Okoth Okoyo who is also the Plaintiff herein.
 7. PW1 introduced himself as a farmer residing in Awendo within Migori County.
 8. PW1 informed the Court that he had prepared a witness statement dated 17/03/2017 and signed the same.
 9. PW1 thereafter adopted the said witness statement dated 17/03/2017 as his evidence in chief thereof.
 10. In addition to the above, PW1 stated that he was familiar with the property known as LR No Transmara/Olontare/214 which measures approximately 7.2 Hectares.



11. PW1 informed the Court that the property known as LR No Transmara/Olontare/214 belonged to his deceased father Thomas Okoyo Oleo .
12. According to PW1, there was initially a property known as Plot No 116 which had been allocated to Okongo Ole Kunywa , Joseph Ogenga Oleo and Thomas Okoyo Oleo .
13. Plot No 116 was then sub-divided into two portions namely LR No Transmara/Olontare/213 and LR No Transmara/Olontare/214.
14. The property known as LR No Transmara/Olontare/213 was registered in the names of Joseph Ogenga Oleo and Okongo Ole Kunywa .
15. The property known as LR No Transmara/Olontare/214 was registered in the name of Thomas Okoyo Oleo .
16. The property known as LR No Transmara/Olontare/214 was passed from Thomas Okoyo Oleo to the Plaintiff's mother Mashama Atieno Okoyo and Gilbert T.O Ochieng through transmission upon a successful administration of the estate of Thomas Okoyo Oleo .
17. Upon the demise of Mashama Atieno Okoyo and Gilbert T.O Ochieng , the Plaintiff had the property known as LR No Transmara/Olontare/214 transmitted to his upon a successful administration of the estate of Mashama Atieno Okoyo.
18. PW1 then produced the following documents as exhibits in support of his case.

Plaintiff's Exhibit 1- Copy of the Green Card of the property known as LR No Transmara/Olontare/214.

Plaintiff's Exhibit 2- A copy of an official search of the property known as LR No Transmara/Olontare/214.

Plaintiff's Exhibit 3- Copy of Grant of Letters of Administration in respect of the estate of Gilbert T.O Ochieng vide Kisii HCC Succession Cause No 401 of 2013 issued on the 5th of April 2016.

Plaintiff's Exhibit 4- Copy of the Certificate of confirmation of Grant in respect of the estate of Gilbert T.O Ochieng vide Kisii HCC Succession Cause No 401 of 2013 issued on the 4th of February 2016.

Plaintiff's Exhibit 5- Copy of the Grant of Letters of Administration in respect of the estate of Masliana Atieno Okoyovide Kisii HCC Succession Cause No 402 of 2013 issued on the 4th of February 2016.

Plaintiff's Exhibit 6- Copy of Certificate of confirmation if grant in respect of the estate of Masliana Atieno Okoyovide Kisii HCC Succession Cause No 402 of 2013 issued on the 24th of November 2016.

Plaintiff's Exhibit 7- Copy of the Title Deed in respect of LR No Transmara/Olontare/214 issued on the 7th of December 2016.

Plaintiff's Exhibit 8- Copy of an official search in respect of LR No Transmara/Olontare/214 issued on the 7th December 2016.

Plaintiff's Exhibit 9- Copy of an official search in respect of LR No Transmara/Olontare/214 issued on 10th February 2017.

Plaintiff's Exhibit 10- Copy of Dem and letters dated 20th May 2013.

PW1 further produced addition documentary evidence through the Supplementary Bundle of Documents dated 14th January 2020.



- The Plaintiff's Exhibit 11- A copy of the adjudication proceedings No 87/88 dated 18th August 1988.
- Plaintiff's Exhibit 12- Copy of Certificate of Official Search dated 17th April 2008 in respect on the property known as LR No Transmara/Olontare/116.
- Plaintiff's Exhibit 13- Copy of Certificate of Official Search dated 4th December 2000 in respect of the property known as LR No Transmara/Olontare/116.
- Plaintiff's Exhibit 14- Copy of Certificate of Official Search dated 22nd March 2012 in respect of the property known as LR No Transmara/Olontare/116.
- Plaintiff's Exhibit 15- Copy of the Mutation Form in respect of LR No Transmara/Olontare/116 dated 23rd January 2013.
- Plaintiff's Exhibit 16- Copy of the District L and Registrar's Notice to visit the suit property with an aim of settling the dispute herein dated 25th January 2017.
- Plaintiff's Exhibit 17- Copy of the Plot Card for Plot. 116 Olontare dated 30th December 2002.
- Plaintiff's Exhibit 18- Copy of an Agreement for Sale of Plot 116 Olontare dated 30th December 2002.
- Plaintiff's Exhibit 19- A bundle of Photographs confirming the Plaintiff's occupation on the suit property.
19. PW1 further testimony was that Defendants herein encroached the property known as LR No Transmara/Olontare/214 in the year 2010.
 20. PW1 stated that the Defendants entry into the property known as LR No Transmara/Olontare/214 was without his permission and the court should therefore order their vacation.
 21. PW1 indicated that the portion occupied by the Defendants was approximately Quarter of an Acre of the property known as LR No Transmara/Olontare/214.
 22. PW1 requested the Court to grant the prayers sought in the Plaint dated 11/03/2017.
 23. PW1 also referred the Court to his Exhibit 19 which confirms that they have been in occupation and use of the property known as LR No Transmara/Olontare/214.
 24. Consequently therefore, PW1 prayer was that the Counter-Claim be dismissed with costs as the same was based on false facts.
 25. In concluding his evidence in Chief, PW1 referred the Court to Exhibit 18 which confirms SAMBASAMRAI LEMASHON was the son of Okongo Ole Kunywa who was one of the original owners of the property known as LR No Transmara/Olontare/116.
 26. On cross-examination, PW1 stated that he was born in the year 1978.
 27. PW1 informed the Court that he was not aware of the year when his deceased father married his deceased mother.
 28. Nevertheless, PW1 stated that the Adjudication Officer allocated the Plot No 116 to the two persons because they resided on the same parcel of land.
 29. PW1 confirmed that his late mother was registered as a proprietor of Plot No 116 until when it was sub-divided in the year 2013.
 30. According to PW1, the father passed away in 1997 and the mother in 2012.



31. Referring to Plaintiff's Exhibit 15, the sub-division of Plot No 116 was done on the 21/12/2012.
32. PW1 testified that the Mutation Form for the sub-division of Plot No 116 was executed by the mother and Roseline Odenyo although the name does not appear on the form.
33. According to PW1, the Defendants had already encroached on the property known as LR No Transmara/Olontare/116 by the time his mother passed away.
34. PW1 stated that his deceased mother tried to remove the Defendants from the property known as LR No Transmara/Olontare/116 through complaining to the area chief but was not successful.
35. Referring to Plaintiff's Exhibit 11, PW1 informed the Court that there was an Appeal but it was subsequently withdrawn.
36. PW1 reiterated that Thomas Okoyo Oleo was his father, Gilbert Ochieng was his elder brother and had since passed away in the year 2011.
37. Stephen Oleo Okoth, Tom Omondi Oluoch, Patrice Okello Olouch And Nancy Achieng are children of PW1.
38. The other persons Juma Wanga and John Odero are PW1 cousins that had been invited into the property known as LR No Transmara/Olontare/116.
39. PW1 denied that Juma Wanga who is his cousin never paid for the portion he occupies on the property known as LR No Transmara/Olontare/214 or had sold any portion to other persons.
40. PW1 confirmed being familiar with the 1st Defendant and Robert Ochola who is his neighbour.
41. PW1 further admitted that he knew other neighbours who had been listed as witnesses by the Defendants.
42. Referring to Plaintiff's Exhibit 18, PW1 denied being a party or witness therein.
43. In Re-examination, PW1 stated that the Defendants lodged an objection in respect to the allocation of the property known as LR No Transmara/Olontare/116.
44. Nevertheless, PW1 deceased father was living of that portion known as LR No Transmara/Olontare/116.
45. Referring to Plaintiff's Exhibit 15, PW1 confirmed that the Mutation forms were executed by his late mother and another person.
46. PW1 further reiterated that he was not given any money to sell any portion of land.
47. PW1 referring to Plaintiff's Exhibit 18, denied being a party or witness thereto.
48. PW1 confirmed that it was the property known as Plot No 116 that gave rise to the property known as LR No Transmara/Olontare/214.
49. At the end of this re-examination, the Plaintiff closed his case thereof.
50. The Defence hearing proceeded on 15/11/2022 with the testimony of Michael Odhiambo Oketch who is the 4th Defendant as DW1.
51. DW1 sought to rely on the Supporting Affidavit dated 13/11/2018 and filed in Court on the 18/01/2019.



52. DW1 confirmed to the Court that he was familiar with the property known as LR No Transmara/Olontare/214.
53. According to DW1, he was born on the property known as LR No Transmara/Olontare/214 and has lived on it with his family ever since.
54. DW1 stated that he was 46 years old and the property known as LR No Transmara/Olontare/214 was the only home he knew of.
55. DW1 further confirmed that the Defendants have been doing cultivation of various crops as well as built residential houses therein and even some of his relatives have been buried on the said property known as LR No Transmara/Olontare/214.
56. DW1 then produced a bunch of photographs to confirm their occupation as well as burial sites of the Defendant's relatives.
57. The bunch of photographs were produced as Defence Exhibits 1 (i-xx)
DW1 further emphasized that his father who passed away in 2009 had actually been buried on the property known as LR No Transmara/Olontare/214.
DW1 the produced a copy of the Death Certificate No 284236 relating to his father as Defence Exhibit 2.
DW1 further stated that the step mother who passed away in 1995 was also buried on the property known as LR No Transmara/Olontare/214 and produced the Death Certificate No 0227347 as Defence Exhibit 3.
DW1 also informed the Court that the sister passed away in 1996 and was buried on the property known as LR No Transmara/Olontare/214 and produced the Death Certificate No 0227348 as Defence Exhibit 4.
DW1 further testified that another sister passed away in the year 2000 and was also buried on the property known as LR No Transmara/Olontare/214 and produced a Death Certificate No 0227350 as Defence Exhibit 5.
In the year 2010, DW1 lost a brother in the year 2010 and was buried on the property known as LR No Transmara/Olontare/214 and a Death Certificate No 0227349 was produced as Defence Exhibit 6.
In the year 2015, DW1 again lost a brother and was buried on the property known as LR No Transmara/Olontare/214 and produced a Death Certificate No 417699 as Defence Exhibit 7.
In the same year 2015, DW1 lost a sister and was buried on the property known as LR No Transmara/Olontare/214 and produced a Death Certificate No 417700 as Defence Exhibit 8.
In the year 2021, DW1 mother passed away and was also buried on the property known as LR No Transmara/Olontare/214 and produced the Death Certificate No 0789291 produced as Defence Exhibit 9.
58. DW1 informed the Court that despite their occupation on the property known as LR No Transmara/Olontare/214, he conducted an official search of the property on the 17/07/2018 and realised that it had been registered in the name of the Plaintiff.
59. DW1 produced a copy of the Official Search dated 17/07/2018 as Defence Exhibit 10.
60. DW1 therefore sought for the Court to sub-divide the property known as LR No Transmara/Olontare/214 which measures 8 Acres and transferred to the Defendants the area they occupy.



61. In cross-examination, DW1 reiterated that they have been occupying a portion of the property known as LR No Transmara/Olontare/214 for the last 47 years.
62. Referring to his witness statement, DW1 stated that the portion which will be excised from the property known as LR No Transmara/Olontare/214 should be registered in the name of all the 2nd to 5th Defendants.
63. DW1 testimony was that during adjudication, his father was left out of the records relating to the property known as LR No Transmara/Olontare/116.
64. Consequently thereof, DW1 of was of the view that a portion of the property known as LR No Transmara/Olontare/214 should be registered in their name.
65. DW1 further indicated that he had objected to the Transfer of the property known as LR No Transmara/Olontare/214 to the Plaintiff.
66. DW1 referred to the Court to the Plaintiff's Exhibit 11 which were objection proceedings contained in the proceedings known as 87/88 relating to Plot No 116 Olontare Adjudication Section.
67. DW1 confirmed that the original parcel known as Plot No 116 was allocated to three persons and these people were still on the ground.
68. DW1 further confirmed that the Plot No 116 was sub-divided into two portion namely LR No Transmara/Olontare/213 and LR No Transmara/Olontare/214 in the year 2012.
69. DW1 admitted that indeed, any claim by his father or themselves should have been raised within 12 years from the year 2012 when sub-division was done.
70. DW1 stated that before 2012, the property known as LR No Transmara/Olontare/214 did not have a title to it.
71. DW1 informed the Court that the 3rd Defendant was not in good health but was still alive.
72. DW1 confirmed that the 3rd Defendant was one of the person's seeking proprietary rights on the property known as LR No Transmara/Olontare/214.
73. Referring to Plaintiff's Exhibit 18, DW1 confirmed that the Agreement For Sale showed the 3rd Defendant purchasing l and from Samraj Lemoison.
74. According to DW1, the portion that the 3rd Defendant was buying from Samraj Lemoison was within the original Plot No 116.
75. DW1 confirmed that he was one of the witnesses in the Agreement For Sale produced as Plaintiff Exhibit 18.
76. DW1 denied the allegation that the 3rd Defendant's occupation was based on a purchase within the original portion known as Plot No 116.
77. DW1 admitted that they did not have any documentary evidence to prove their father's interest and/or ownership in the property known as LR No Transmara/Olontare/214.
78. Referring to the Plaintiff's Exhibit 17 which is the Adjudication Record, the name of DW1 father was not recorded as one of the owners.
79. However, DW1 stated that the comment by the L and Adjudication officer was that all the three persons were to get 7.2 Hectares each.



80. DW1 disputed that the Defendants took possession of their portion within the property known as LR No Transmara/Olontare/214 in the year 2010.
81. In re-examination, DW1 reiterated that the Adjudication Record of Plot No 116 was records in the names of three persons namely Joseph Ogenga, Okunga Ole Kunywa And Thomas Okoth.
82. Referring to the Plaintiff's Exhibit 17, DW1 stated that this Agreement can not be true because the Vendor had never owned the land.
83. DW1 indicated that the original title to Plot No 116 was never issued by the lands department.
84. DW1 stated that the only title he was aware of was the one for LR No Transmara/Olontare/214.
85. At the end of this Re-examination, DW1 completed his testimony and was discharged from the witness box.
86. The 2nd Defence witness was Jared Ooko Okoth who is also the 5th Defendant in this suit.
87. DW2 informed the Court that he was a resident of Olontare and does farming for a living.
88. DW2 stated that he had prepared and signed a Supporting Affidavit dated 13/11/2018 and filed the same in court on the 18/11/2018.
89. DW2 then adopted the said Supporting Affidavit dated 13/11/2018 as his evidence in chief and fully relied on the contents thereof.
90. In cross-examination, DW2 stated that he knew John Oketch Oloo .
91. DW2 informed the Court that he was born on the property known as LR No Transmara/Olontare/214.
92. According to DW2, his father was the legitimate owner of the property known as LR No Transmara/Olontare/214.
93. DW2 stated that he was not familiar with the issues regarding the property known as Plot No 116.
94. DW2 told the court that he knew Joseph Ogenga, Okungo Ole Kunywa And Thomas Okoyo.
95. DW2 informed the Court that Ole Kunywa resided on the other side of the river although in the same parcel of land.
96. DW2 indicated that Joseph Ogenga And Thomas Okuyo were also neighbours.
97. DW2 stated that he was aware that Plot No 116 was sub-divided by could not with certainty indicate when this was done.
98. DW2 also disagreed that they took possession in the year 2010.
99. DW2 reiterated that their father was entitled to be allocated a portion of the property known as Plot No 116 and therefore their occupation was indeed lawful and prove of their father's rights.
100. DW2 nevertheless admitted that they did not have any documentary evidence to prove such proprietary and/or allocation of Plot No 116.
101. On completion of this cross-examination, the Defence Counsel did not have any re-examination and the witness was discharged from the witness box.
102. The 3rd Defence witness was Lemashon Ole Sanpurep.



103. DW3 introduced himself as a farmer and resident of Olontare within Narok County.
104. DW3 stated that he was neighbours with the Defendants herein.
105. DW3 informed the Court that at the time he was maturing in 1978, the Defendants family was already residing on the portion which they reside up to date.
106. DW3 further stated that his father is Ole Samparon.
107. Referring to Plaintiff's Exhibit 17, DW3 denied the contents of the said Agreement For Sale and stated that he has never owned any land and to be capable of disposing it off.
108. In concluding his evidence in chief, DW3 confirmed to have prepared and filed a witness statement dated 18/01/2019 and therefore sought to rely on its contents fully.
109. In cross-examination, DW3 confirmed that Okungo Ole Kunywa was his father.
110. DW3 confirmed that Joseph Ogenga and his father Okungo Ole Kunywa were owners of the property known as Plot No 116.
111. DW3 stated that John Oleo Oketch was not registered as one of the owners of Plot No 116.
112. DW3 further stated that he was not aware whether Oleo Oketch placed objection proceedings or not on the Plot No 116.
113. DW3 informed the Court that he had not carried his Identification Card but the number appearing of the Plaintiff's Exhibit 17 was similar to his.
114. DW3 nevertheless denied ever executing such an Agreement For Sale.
115. DW3 however stated that he had not filed any claims of forgery in any police station despite being aware of the said Agreement for Sale.
116. According to DW3, the transfer of the property known as LR No Transmara/Olontare/214 was fraudulent.
117. DW3 insisted that even though the Defendant's father's name was not on the original Plot No 116, the Defendants should have been given land because they occupy a portion of the same.
118. The Defence Counsel having No question for re-examination, the witness was discharged from the witness box.
119. The 4th and last Defence witness was Nobert Ocholla Agoo.
120. DW4 informed the Court that he had prepared and filed a witness statement dated 18/01/2019 which he adopted the same as his evidence in chief.
121. Referring to Defence Exhibit 1, DW4 confirmed that the pictures include the homes of John Oleo Oketch And Prisca Ondieki Oketch who has since passed away.
122. DW3 indicated that the two above mentioned persons occupied the property known as LR No Transmara/Olontare/214 with their children who are listed herein as 3rd, 4th and 5th Defendants since 1960.
123. DW3 stated that by the time he was being mature in 1972, the Defendant's family was already on the ground.
124. In cross-examination, DW4 stated that in 1988, he was about 21 years old.



125. DW3 informed the Court that the suit property known as LR No Transmara/Olontare/214 was neighbouring where he stayed.
126. DW3 told the court that he was not privy to the objection proceedings touching on the property known as Plot No 116.
127. DW3 stated that Ole Kunywa does not live on the property known as LR No Transmara/Olontare/214.
128. However, Thomas Okeyo who was a father to the Plaintiff lived within the property known as LR No Transmara/Olontare/214 together with the Defendant.
129. Referring to Plaintiff's Exhibit 17, DW3 admitted that his name does appear as a witness in the Agreement For Sale and confirmed signing the same.
130. DW3 confirmed the Ole Kunywa was the father of the Vendor in the said Agreement For Sale.
131. DW3 however denied knowledge of the contents in the Agreement For Sale and stated that he was only a witness.
132. There was No re-examination for this witness and the Defence Counsel thereafter closed their case.
133. Parties were then directed to file their written submissions and the Plaintiff filed theirs on 8th of February 2013 but unfortunately, the Defendants did not file any despite the Court's directions.
134. The Court having gone through the pleadings in this suit, as well as the evidence adduced in the trial court and the documentary evidence produced therein, the issues for determination can be summarised as follows; -

Issue No 1- Was the property known as LR No Transmara/Olontare/214 lawfully created from Plot No 116?

Issue No 2- Is the plaintiff herein the lawful registered owner of the property known as LR No Transmara/Olontare/214?

Issue No 3- Are the defendants entitled to a claim of adverse possession against the plaintiff on the property known as LR No Transmara/Olontare/214?

Issue No 4- Is the plaintiff entitled to the reliefs sought in the plaint dated 11th March 2017?

Issue No 5- ARE The defendants entitled to the reliefs sought in the counter-claim dated 22nd October 2018?

Issue No 6- Who bears the costs of the suit & counter-claim?

135. The Court having identified the core issues in this suit, the same will now be discussed hereinbelow as follows.

Issue No 1- Was The Property Known As LR No Transmara/Olontare/214 Lawfully Created From Plot No 116?

136. According to the testimony of the Plaintiff and the Defendants herein, there is a common ground that the property known as LR No Transmara/Olontare/214 was a sub-division of a property known as LR No Transmara/Olontare/116.
137. The property known as LR No Transmara/Olontare/116 was Plaintiff's Exhibit 12,13 and 14 registered in the name of Okunga Ole Punywa, Joseph Ogenga Olew And Thomas Okoyo Olew.



138. According to the Search dated 22nd March 2012 which is produced as Plaintiff's Exhibit 14, there is an entry in the Green Card which describes the share holding of the property known as LR No Transmara/Olontare/116 being equal shares of a third each.
139. Thereafter, Plaintiff's Exhibit 15 which is the Mutation form dated 23.01.2013 shows that the property known as LR No Transmara/Olontare/116 was sub-divided two portions.
140. The first sub-division was identified as LR No Transmara/Olontare/213 measuring approximately 14.4 Hectares while the second sub-division was LR No Transmara/Olontare/214 measuring approximately 7.2 Hectares.
141. The Mutation Form produced as Plaintiff's Exhibit 15 recognised the persons known as Okunga Ole Punywa, Joseph Ogenga Olew, Masiliana Atieno Okoyo & Gilbert T.O.Ochieng as persons with an interest on the property known as LR No Transmara/Olontare/116.
142. Page 3 of the Mutation Form produced as Plaintiff's Exhibit 15 contains a field diagram and observations which clearly shows how the demarcation of the sub-division was marked on the ground as at 21.12.2012.
143. Page 4 of the same Mutation Form contains signatures of the registered owners of the property known as LR No Transmara/Olontare/116 which was being sub-divided and a verification by the District and/or Licensed Surveyor thereof.
144. During the hearing of this suit, both the Plaintiff or the Defendants did not challenge any aspect of the Mutation Form which was produced as Plaintiff's Exhibit No 15.
145. In essence therefore, the Court makes a finding that the sub-division of the property known as LR No Transmara/Olontare/116 into LR No Transmara/Olontare/213 and LR No Transmara/Olontare/214 was legally done.

Issue No 2- Is The Plaintiff Herein The Lawful Registered Owner of The Property Known As LR No Transmara/Olontare/214?

146. According to the Plaintiff's Exhibit 1 which is the Green Card of the property known as LR No Transmara/Olontare/214, the registered owner is the Plaintiff herein.
147. The copy of the Official Search dated 17th May 2013 and produced as Plaintiff's Exhibit 2 reconfirms the entry of the Plaintiff as the registered owner of the property known as LR No Transmara/Olontare/214.
148. The Plaintiff's Exhibit 3, 4, 5 and 6 are Court documents that refer to the Estates of Gilbert.T.O.Ochieng (Deceased) and Masliana Atieno Okoyo(Deceased) who were the registered owners of the property known as LR No Transmara/Olontare/214 before the Plaintiff.
149. In particular, Plaintiff's Exhibit 4 and 6 confirm the transmission of the property known as LR No Transmara/Olontare/214 from the Estate of Gilbert.T.O.Ochieng and Masliana Atieno Okoyorespectively to the Plaintiff.
150. The Defendants herein during the hearing and/or in their pleadings have not challenged the validity of the proceedings known as Kisii HCC GiSuccession No 401 of 2013 and in particular the Certificate of Confirmation of Grant issued on the 24th of November 2016 in regards to the Estate of Gilbert T.O.Ochieng .



151. Similarly, the Defendants herein did not challenge the validity of the proceedings known as Kisii HCC GiSuccession No 402 of 2013 and in particular the Certificate of Confirmation of Grant issued on the 24th of November 2016 in regards to the Estate of Masliana Atieno Okoyo.
152. In essence therefore, the registration of the Plaintiff as the owner of the property known as LR No Transmara/Olontare/214 was pursuant to the two Certificates of Confirmation of Grant dated 24th November 2016 belonging to Gilbert T.O.Ochieng (Deceased) and Masliana Atieno Okoyo(Deceased).
153. This process of registration the under the Law of Succession is legitimate in law and can not be purported to be fraudulent or against the law.
154. In other words, the Plaintiff's registration as the owner of the property known as LR No Transmara/Olontare/214 was indeed valid and lawful.

Issue No 3- Are The Defendants Entitled To A Claim of Adverse Possession Against The Plaintiff On The Property Known As LR No Transmara/Olontare/214?

155. The Defendants herein have jointly made a claim of adverse possession against the Plaintiff herein.
156. According to the evidence and witness statements of the Defendants herein, their claim emanates from their father known as John Oketch Oloo (deceased).
157. The 1st Defendant known as Priska Ondiek Oketch is the 2nd, 3rd, 4th and 5th Defendant's mother.
158. DW1 testified before the Court that he was 46 years old and had been born on the suit property known as LR No Transmara/Olontare/214.
159. DW1 further produced numerous Death Certificates of family members who had passed away during their occupation of the property known as LR No Transmara/Olontare/214 and buried on the same.
160. DW1 also produced as Defence Exhibit 1, a bundle of photographs proving their occupation of the property known as LR No Transmara/Olontare/214 including houses, trees and burial sites of their loved ones.
161. In essence therefore, the Defendants claim is that they have been in occupation of a portion measuring approximately 3.2 Hectares on the property known as LR No Transmara/Olontare/214 since 1960s and the Plaintiff's title should be now be extinguished and transferred to them.
162. On the other hand, the Plaintiff's testimony is that the Defendants encroached into the property known as LR No Transmara/Olontare/214 on or about 2010.
163. According to the Plaintiff, the portion of LR No Transmara/Olontare/214 encroached by the Defendants is about Quarter of an Acre and not 3.2 Hectares as alleged.
164. In addition to the above, the Plaintiff further testified that the Defendants entry onto the property known as LR No Transmara/Olontare/116 was pursuant to an Agreement For Sale dated 30-12-2002 (produced as Plaintiff's Exhibit 18) between Samrad Lemashon of Kenyan Identification Card No 12804984 and 3rd Defendant.
165. During the hearing of this suit, the 5th Defendant who was DW1 denied knowledge of this Agreement For Sale dated 30-12-2002 and emphasized that their occupation on the property known as LR No Transmara/Olontare/214 was from way back before he was born.
166. DW2 was John Oketch Oloo who is also a son to the Prisca Ondieki Oketch and the 1st Defendant.



167. DW2 stated that he was born on the property known as LR No Transmara/Olontare/214 and has been living on the said property all his life.
168. DW2 denied the allegation that their occupation began in the year 2010 and further stated that he was not aware of the Agreement For Sale dated 30-12-2002.
169. DW2 nevertheless admitted that they did not have any documents to show that their father was entitled to any portion of l and within the property known as LR No Transmara/Olontare/214.
170. What DW2 insisted upon their actual occupation of the property known as LR No Transmara/Olontare/214.
171. DW3 who was Lemashon Ole Sanpurap confirmed that his father was Ole Kunywa who was one of the owners of the property known LR No Transmara/Olontare/116.
172. Nevertheless, he denied knowledge of the Plaintiff's Exhibit 18 which is the Agreement For Sale dated 30-12-2002 between himself and the 3rd Defendant.
173. According to DW3, the Defendants have been in occupation of the property known as LR No Transmara/Olontare/214 since 1960s.
174. When asked about the Identification Card of the Vendor who appears on the Agreement For Sale dated 20-12-2002, DW3 confirmed that it was indeed his Identification Card thereof.
175. However, he stated that he did not have any ownership of the property known as LR No Transmara/Olontare/116 and therefore could not have sold any l and to the 3rd Defendant.
176. The last witness DW4 was one Nobert Ocholla Agoo.
177. DW4 simply informed the Court that the Defendants had been in occupation of the property known as LR No Transmara/Olontare/214 since the 1960s.
178. DW4 relied on the pictures produced as Defence Exhibit 1 to collaborate his evidence of the Defendants occupation on the ground.
179. DW4 also confirmed that he was aware of the Agreement For Sale dated 30-12-2002 (Plaintiff's Exhibit 18) as a witness but denied knowledge of the contents and/or legal implementation of the said document.
180. The principles against which claims of adverse possession must be considered upon have been discussed in various cases within our jurisdiction.
181. In the celebrated case of *Mtana Lewa v Kabindi Ngala Mwagandi* (2015) eKLR, the ingredients of adverse possession were highlighted as follows; -
- “For one to succeed in a claim of adverse possession , one must prove and demonstrate that he has occupied the l and openly, that is without secrecy, without force, and without license or permission of the l and owner, with the intention to have the land. There must be an apparent dispossession of the l and from the l and owner. These elements are contained in the latin maxim nec vi, nec cla, nec precario.”
182. The Court of Appeal sitting at Kisumu in Civil Application No 110 of 2016 *Richard Wefwafwa Songoi v Ben Munyifwa Songoi* (2020) eKLR held that for a person to establish a claim of adverse possession, the following broad principles must be satisfied; -



- a. On what date he came into possession.
 - b. What was the nature of his possession.
 - c. Whether the fact of his possession was known to the other party.
 - d. For how long his possession has continued and
 - e. That the possession was open and undisturbed for the requisite 12 years.
183. Based on the above broad principles, the Court will evaluate whether or not the Defendants have established successful claim of adverse possession.

a) On what date did the claimants come into possession of the property known as L.R.Transmara/Olontare/214?

184. The Defendants as well as their witnesses testified alleging occupation by their deceased father and mother John Oketch Oloo and Priska Ondiek Oketch (the 1st Defendant) on the suit property.
185. Throughout their entire lives, the 2nd to 5th Defendants alleged to have been staying on the property known as LR No Transmara/Olontare/214.
186. It is important to refresh our mind that the property known as LR No Transmara/Olontare/214 was a sub-division of the property known as LR No Transmara/Olontare/116 which was originally commonly owned by Okunga Ole Punywa, Joseph Ogenga Olew And Thomas Okoyo Olew.
187. Referring to the L and Adjudication Objection Proceedings No 87/88 dated 18th August 1988 (produced as Plaintiff's Exhibit 11) the Court takes note that the objection proceedings were dealing with the persons who were in occupation of the property known as LR No Transmara/Olontare/116 and how they had settled on the said property.
188. The determination of the L and Adjudication Officer in these proceedings contained in Plaintiff's Exhibit 11 was that the persons on the ground were Okunga Ole Punywa, Joseph Ogenga Olew And Thomas Okoyo Olew.
189. These three owners are the ones who were registered in the Green Card of LR No Transmara/Olontare/116 from way back in 2008 as confirmed in the Plaintiff's Exhibits 12,13 and 14 which are official searches of the said property as persons on the ground.
190. The Defendant's father known as John Oketch Oloo cannot have been on any portion of the property known as LR No Transmara/Olontare/116 and not recognised and/or mentioned during the Adjudication process.
191. There is not documentary evidence placed before the Court that the Defendant's father John Oketch Oloo made any effort during the adjudication process to be recognised and/or allocated a portion of the property known as LR No Transmara/Olontare/116 which can now be deemed to be LR No Transmara/Olontare/214.
192. The Defendants herein seem to place a lot of emphasis of their occupation of the property known as LR No Transmara/Olontare/214 on the photographs contained in Defence Exhibit 1.
193. However, the pictures produced as Defence Exhibit 1 do not show when the same were taken keeping in mind that the Counter-Claim was filed in the year 2018.



194. In other words, the photographs contained in the Defence Exhibit 1 do not speak to the date of when the Defendants entered the property known as LR No Transmara/Olontare/214.
195. In conclusion therefore, the Defendants allegation that they entered the property known as LR No Transmara/Olontare/214 in the year 1960s or more than 12 years prior to the institution of this suit has not been proved at all.
196. Admittedly, although the photographs in Defence Exhibit 1 show houses, crops and burial sites, the same have been produced in contravention of Section 106 B of the *Evidence Act*, Cap 80 Laws of Kenya.
197. Section 106 B (4) of the *Evidence Act*, Cap 80 laws of Kenya requires that if a party is to rely upon electronic Records like the photographs produced as Defence Exhibit, such records should be accompanied with a certificate from the maker.
198. In the absence of such evidence, the Court is of the view that the Defendants have not proved their entry into the property known as LR No Transmara/Olontare/214 to have happened in the year 1960s.
199. In addition to the above, the Defendant's claim for adverse possession has been raised against the property known as LR No Transmara/Olontare/214 only.
200. According to the Mutation Form of LR No Transmara/Olontare/116 dated 23/01/2013, the property known as LR No Transmara/Olontare/214 was created in the beginning of the year 2013.
201. Before then, the property known as LR No Transmara/Olontare/214 did not exist in law but LR No Transmara/Olontare/116 was in existence.
202. Indeed therefore, if the Defendants had been in occupation since the 1960s as alleged, then the claim of adverse possession should have been against L.R No Transmara/Olontare/213 and 214 jointly and not just one portion.

b) What was the nature of his possession.

203. The Defendants testified that the nature of their occasion was open and without secrecy for more than 12 years prior to the filling of this Counter-Claim dated 22nd October 2018.
204. The Defendants have produced a bundle of photographs as Defence Exhibit 1 within the property known as LR No Transmara/Olontare/214.
205. Although the Court has viewed the photographs on the Defence Exhibit 1, the Plaintiff has submitted that they are inadmissible as evidence on the ground that No certificate has been prepared and presented to Court by the maker as required in Section 106 B (4) of the *Evidence Act*, Cap 80 Laws of Kenya.
206. He is true that DW3 did not produce any Certificate from the Maker of the said photographs to confirm their authenticity.
207. DW3 did not state that he took the said photographs produced in Court and neither was the photographer called to produce the same and thereafter confirm the Certificate to be his own documents.
208. In such a circumstance, the authenticity and accuracy of the photographs produced as Defence Exhibit 1 can not be verified by this Court that indeed the houses, developments and/or burial sites are within the property known as LR No Transmara/Olontare/214 and are therefore inadmissible.



209. In addition to the above, the Defendants did not bring any witness(es) or file any Report confirming that indeed their occupation is within the area measuring 3.2 Hectares within the property known as a L.R No Transmara/Olontare/214 and not LR No Transmara/Olontare/213.
210. The reason why this Court has brought up this issue is because the Defendants occupation if indeed happened, which this Court doubts was within the property known as LR No Transmara/Olontare/116 generally and not specifically on LR No Transmara/Olontare/214.
211. It was therefore crucial that the Defendants create a link between their area of occupation on the property known as LR No Transmara/Olontare/116 and the sub-division which resulted to LR No Transmara/Olontare/214.
212. In the absence of such a link through documentary evidence, then the Defendants fail short of rightfully identifying the portion within LR No Transmara/Olontare/116 which they occupied and was subsequently sub-divided to LR No Transmara/Olontare/214.
213. In conclusion therefore, the Court of the considered opinion that the Defendants have failed to establish their possession was open and without secrecy to the Plaintiff as there is No proof that the portion occupied by the Defendants is indeed LR.No Transmara/Olontare/214 and not the other sub-division known as LR No Transmara/Olontare/213.

c) Whether the fact of his possession was known to the other party.

214. The Defendant in this principle is required to prove that the owner of the property was well aware of their possession or occupation of the land and being claimed under adverse possession.
215. In this case, the property known as LR No Transmara/Olontare/214 was created in the year 2013.
216. According to the Plaintiff's testimony, the Defendants occupation commenced on or about 2010.
217. The property which was in existence prior to the year 2012 was LR No Transmara/Olontare/116 owned by Okunga Ole Punywa, Joseph Ogenga Olew and Thomas Okoyo Olew.
218. The first time that the property known as LR No Transmara/Olontare/214 was created and issued with an independent Title Deed was on the 17.05.2013.
219. In the Court's considered opinion, if the Plaintiff was to be aware of the Defendants presence on the property known as LR No Transmara/Olontare/214, such knowledge could only be after 17.05.2013 and not before the said date.

d) For how long has possession continued and

220. Based on the determinations hereinabove, the period upon which the Defendants could be said to have occupied the property known as LR No Transmara/Olontare/214 can only have begun in the 17.05.2013.
221. The reason why the Court has taken this line of thinking is that the property known as LR No Transmara/Olontare/116 No longer exists and its Green Card has since been closed.
222. The Defendants in any event have not placed any adverse possession claim against the property known as LR No Transmara/Olontare/116.
223. Clearly therefore, if the Defendants have No claim against the property known as LR No Transmara/Olontare/116, any subsequent claim can only begin running after the registration of the new sub-divisions which is 17.05.2013 and not before the said date.



224. In essence therefore, any occupation if at all it exists, which the Court doubts will have been only 7 years old at the time of filing the Counter-Claim on the 22nd of October 2018.

e) That the possession was open and undisturbed for the requisite 12 years.

225. Lastly but not least, the Court is of the considered opinion that the Defendants herein have not enjoyed open possession of the property known as LR No Transmara/Olontare/214 for a period of 12 years uninterrupted as required in law.

226. In conclusion therefore, the Defendants have not satisfied the 5 main ingredients of a claim for adverse possession and the same against the Plaintiff herein is denied.

Issue No 4- Is the Plaintiff Entitled to the Reliefs Sought in the Plaint Dated 11th March 2017?

227. Based on the determinations made hereinabove under Issues 1, 2 and 3, the Court is of the considered view that the Plaintiff has proved his case sufficient and is entitled to prayer No (i) (ii) and (iii) in the Plaint dated 11th March 2017.

228. Unfortunately, the Plaintiff herein failed to address the issue of general damages or make any submissions and the Court shall not award the same.

Issue No 5- Are the Defendants Entitled to the Reliefs Sought in the Counter-claim Dated 22nd October 2018?

229. Based on the determination in Issue No 3 hereinabove, the Defendants claim of adverse possession against the Plaintiff as the registered owner of LR No Transmara/Olontare/214 is not merited and/or granted.

Issue No 6- Who Bears the Costs of the Suit & Counter-claim?

230. The Costs of the Plaintiff's suit and the Defendants Counter-Claim be borne by the Defendants herein.

231. In conclusion thereof, the Court hereby makes the following Orders appertaining the Plaint dated 11th March 2017 and the Counter-Claim dated 22nd October 2018.

- a. A declaration be and is hereby made to the effect that the defendants herein do not have any lawful rights and/or interests over and in respect of LR No Transmara/Olontare/214, or any portion thereof.
- b. The defendants are jointly and severally ordered to vacate and/or yield vacant possession of any property known as LR No Transmara/Olontare/214 within the next sixty (60) days from the date of this judgement failure to which an eviction order shall automatically issue upon expiry of the said period provided herein.
- c. A permanent injunction be and is hereby issued restraining the defendants either by themselves, agents, servants and/or anyone claiming under the defendants from re-entering upon, trespassing onto, laying a claim to, cultivating, leasing, building on, interfering with and/or in any other manner, whatsoever dealing with the suit property or any portions thereof, that is LR No Transmara/Olontare/214, in any manner prejudicial and/or adverse to the rights and interests of the plaintiff.
- d. Costs of the plaint and the counter-claim will be borne by the defendants.



DATED, SIGNED & DELIVERED VIRTUALLY IN KILGORIS ELC COURT ON 27TH MARCH 2023.

EMMANUEL.M.WASHE

JUDGE

In the presence of:

Court Assistant: Ngeno

Advocate For The Plaintiff: Miss Ochwal

Advocate For The Defendants: N/a

